NO. 85-98

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & CO., GMBH.,
Petitioner,

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent, Compania Gijonesa de Navigacion, S.A. disagrees with Petitioner's statement of the question presented. Rather, the issues presented are:

I. Whether Petitioner, Anschuetz & Co., GmBH. waived the right to raise the Hague Evidence Convention as a bar to discovery where Petitioner participated in and initiated discovery under the Federal Rules of Civil Procedure, and where Petitioner waited until five years after the commencement of litigation to raise the Hague Evidence Convention as a defense to discovery.

II. Alternatively, whether the Fifth Circuit correctly determined the Hague Evidence Convention has no application to discovery ordered to take place in the United States from parties (or persons within the control of parties) over whom a United States District Court has jurisdiction.

TABLE OF CONTENTS

Page

Question Presented.....i
Table Of Contents.....ii
Table Of Authorities.....iii
Statement.....1
Reasons For Refusing The Writ.....6

I. Anschuetz Should Not Be Allowed To Raise The Question Of The Applicability Of The Hague Evidence Convention Before This Court Where It Failed To Timely Assert The Issue Before The District Court.....6

II. Even Assuming That Petitioner Did Not Waive Its Right To Raise The Hague Convention, Petitioner's Petition For A Writ Of Certiorari Should Be Denied.....8

Conclusion.....14
Certificate Of Service.....16

TABLE OF AUTHORITIES

CASES Page

Anschuetz & Co., Gmbh, In Re,
754 F.2d 602 (5th Cir. 1985).....11,12,13,14

Club Mediterranee, S.A. v. Dorin,
105 S.Ct 286 (1984)(appeal dismissed and
cert. denied).....9

Cooper Industries, Inc. v. British Aerospace, Inc.,
No. 83 Civ. 6366 (S.D.N.Y. Aug. 28,1984).....7

Curtis Publishing Co., v. Butts,
388 U.S. 130, 87 S.Ct. 1975,
18 L.Ed.2d 1094 (1967).....7

Francis v. Henderson,
425U.S. 536, 96 S.Ct. 1708,
48 L.Ed.2d.149 (1976).....6,7

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,
456 U.S. 694, 102 S.Ct. 2099 (1982).....6

Messerschmitt Bolkow Blohm GmbH, In re
757 F.2d 729 (5th Cir. 1985).....

Murphy v. Reifenhauser KG Maschinenfabrik,
101 F.R.D. 360 (D.Vt. 1984).....7,13

Verlinden B.V. v. Central Bank of Nigeria,
461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed. 81 (1983).....11

Volkswagenwerk A.G. v. Falzon,
104 S.Ct. 1260 (appeal dismissed),
reh. denied, 104 S.Ct. 1932 (1984).....9

FEDERAL STATUTES AND COURT RULES

Fed. R. Civ. P. 8(c).....6
Fed. R. Civ. P. 12(h).....6
Fed. R. Civ. P. 26(f).....2
Fed. R. Civ. P. 30(b)(b).....1

STATEMENT

On February 3, 1979, the M/V POLA DE LENA, a Spanish registry oceangoing vessel, collided with a ferry landing and ferries on the Mississippi River near New Orleans, Louisiana. Respondent Compania Gijonesa de Navegacion S.A. (Gijonesa),[1] the owner of the vessel, was sued by the Mississippi River Bridge Authority, the owner of the ferry landing and ferries damaged in the casualty. Petitioner Anschuetz, a German Company and the manufacturer of steering gear equipment aboard the M/V POLA DE LENA which is alleged to have failed, was brought into the litigation through a third-party complaint filed by Gijonesa on July 9, 1980. After a lenghty jurisdictional battle, the district court held that it had *in personam* jurisdiction over Anschuetz. Anschuetz thereafter actively participated in the case by filing a third-party complaint against a Spanish shipyard, filing counter-claims, *undertaking discovery*, and agreeing to fund settlements.

On October 12, 1983, Gijonesa filed interrogatories and a request for production of documents from Anschuetz with respect to the type, design and maintenance of the steering system on the POLA DE LENA. On October 20, 1983, Gijonesa filed a Notice of Deposition of Anschuetz representatives pursuant to Fed.R.Civ.P. 30(b)(6).

Anschuetz eventually produced a few non-responsive documents. In light of Anschuetz's failure and apparent difficulty in obtaining the necessary documents, Gijonesa noticed a Rule 30(b)(6) telephone deposition on January 4, 1984, to enable Anschuetz to designate the individuals who had knowledge of the location, type, and number of documents requested. Anschutez filed a motion to quash

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[1] As required by Supreme Court Rule 28.1, Compania Gijonesa de Navegacion states that it has no parent companies, subsidiaries or affiliates within the scope of the rule.

telephone depositions. A court hearing was held on January 25, 1984, wherein the court dismissed Gijonesa's telephone deposition request as moot on the basis of discovery agreements between Anschuetz and Gijonesa. The extent of the agreements were that Gijonesa would limit the scope of the document request and Anschuetz would designate a coporate representative and appropriate witnesses to testify in person in Germany; tentative dates were discussed.

Anschuetz violated these discovery agreements thereby forcing Gijonesa to move for a motion to compel production of documents and for a discovery conference pursuant to Fed.R.Civ.P. 26(f). The United States Magistrate heard the various motions over a four day period in February 1984 and issued a minute entry on February 21, 1984, ordering Anschuetz to comply with the spirit of the document requests and ordering Anschuetz's counsel to forward a copy of the transcript of the hearing immediately to Anschuetz in Germany and to advise the court within five days of the estimated number of documents called for in the document requests. The Magistrate further specifically ordered that the place of the production of the documents was left open pending Anschuetz's compliance with the order.

Anschuetz again failed to comply with the Magistrate's order. On March 8, 1984, Gijonesa filed a motion to impose sanctions for failure to comply with discovery orders and requested a second Rule 26(f) discovery conference.

On March 23, 1984, the Magistrate sanctioned Anschuetz for failure to comply with the court's order and ordered Anschuetz to pay the expense of a Gijonesa

attorney to travel to Germany to take preliminary depositions to determine which Anschuetz personnel had knowledge of the subject matter of the litigation, and for production of documents previously ordered to be produced in New Orleans. The depositions in Germany were ordered as a convenience to Anschuetz in light of (1) Anschuetz's previous inability to designate witnesses, to agree to a telephone deposition, and to furnish the documents, and (2) the fact that counsel had previously agreed to the depositions in Germany.

Anschuetz appealed the Magistrate's sanction order of March 23, 1984, attempting, essentially, a belated "boot strapping" appeal of the Magistgrate's earlier discovery orders. Anschuetz, in effect objected to the taking of fact depositions in Germany to which they had prevously acquiesced, and to the document production required by the district court order. During the month of March the parties had agreed to take fact depositions in Spain of Gijonesa personnel and in Germany of Anschuetz personnel. By letter of March 23, 1984, counsel for Anschuetz confirmed the availability of Anschuetz witnesses in Germany. The dates and scheduling were further confirmed by letters dated March 27 and March 30, 1984. Clearly Anschuetz had intended to take depositions in Germany without objection and was merely objecting to the sanctions imposed by the Magistrate. On March 29, 1984, notices of deposition for Spain and Germany were filed. Up to this point, at no time during the proceedings before the Magistrate did Anschuetz raise the Hague Evidence Convention as a defense to the discovery sought by Gijonesa.

On March 30, 1984, Anschuetz filed a motion to reconsider Anschuetz's motion for protective order and *for the first time obliquely raised the Hague Evidence Conven-*

tion. The motion to reconsider was denied and Anschuetz appealed the Magistrate's sanctions on April 11, 1984. Meanwhile, depositions were taken in Kiel, Germany on April 2 and 3, 1984, at which time Gijonesa identified fact witnesses for future depositions. At this time Gijonesa discovered that Anschuetz had made no attempt to comply with the Magistrate's discovery orders. *These depositions were taken in Germany without the complaint or intervention on the part of the Federal Republic of Germany.*

Anschuetz sought a protective order as to the depositions and a reconsideration-appeal to the district judge of the Magistrate's discovery orders. On April 17, 1984 Gijonesa filed a second motion for sanctions against Anschuetz for failure to abide by the court order of February 16, 1984, regarding production of documents. In response to the motion for sanctions, the Magistrate ordered Anschuetz to produce the requested documents in New Orleans, by April 25, 1984.

On April 13, 1984, the district judge heard Anschuetz's motion to review discovery orders and ruled from the Bench that Anschuetz raised the Convention issue too late, and in any event, that the Hague Evidence Convention did not affect the court's ability to enforce discovery procedures over parties whom the court had jurisdiction, as authorized by the Federal Rules of Civil Procedure.

During the weeks of April 23 and 30, 1984 counsel for Anschuetz and Gijonesa returned to Kiel, Germany and took merit depositions of Anschuetz personnel. Counsel also took depositions of Gijonesa personnel in Spain. During this time Anschuetz applied for a writ of mandamus to the Fifth Circuit, purporting to redress only the Magistrate's order of February 16, 1984, but in

effect, "boot-strapping" an argument on all discovery orders over Anschuetz.

On March 7, 1985, the Fifth Circuit issued its decision refusing to issue a writ of mandamus. The Fifth Circuit, based on policy reasons fully set forth in that court's opinion, held:

> We hold that the Hague Convention is to be employed with the involuntary deposition of a party conducted in a foreign country, and with the production of documents or other evidence gathered from persons or entities in the foreign country who are not subject to the court's in personam jurisdiction. The Hague Convention has no application at all to the production of evidence in this country by a party subject to jurisdiction of a district court pursuant to the Federal Rules. So long as discovery is sought for the identity and qualifications of witnesses there is no basis to suggest that supplying this information amounts to obtaining evidence in Germany. If the discovery sought by Gijonesa of Anshuetz in Germany becomes particularly intrusive or is contemplated for persons not subject to the court's jurisdiction, then the court may order the parties to conduct that discovery under the Hague Convention.

REASONS FOR REFUSING THE WRIT

I. Anschuetz Should Not Be Allowed To Raise The Question Of The Applicability Of The Hague Evidence Convention Before This Court Where It Failed To Timely Assert The Issue Before The District Court

As even the Statement of Anschuetz admits, Anschuetz did not raise the Hague Evidence Convention as a bar to obtaining information located in Germany until it had been a party for almost four years and until these proceedings had been ongoing for *over five years*. During that time period, Anschuetz had participated in depositions in Germany and elsewhere, had noticed depositions, and even had attempted to bring another party into the lawsuit.

Fundamental federal procedural law provides that a party must raise his defenses timely or be deemed to have waived them. For example, Fed.R.Civ.P. 12 provides that most jurisdictional defenses must be asserted either before responsive pleadings are filed, or in the first responsive pleading, under penalty of waiver. *See* Fed.R.Civ.P. 12(h). Fed.R.Civ.P. 8(c) requires that the affirmative defenses enumerated therein be set forth timely.

This Court has held that a party's rights, even rights of a constitutional magnitude far more important than any rights asserted in this case, may be waived by failure to timely assert them. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099 (1982)(noting that failure to enter a timely objection to personal jurisdiction constitutes a waiver of the objection under Fed. R. Civ. P. 12(h)); *Francis v. Henderson*,*425* U.S.*536*, 96 S.Ct. 1708, 48 L.Ed.2d 149(1976)(failure to

timely challenge composition of jury waived right to do so); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975,18 L.Ed.2d 109 (1967)(noting that even constitutional objections may be waived where not timely raised).

Consistent with this long standing legal axiom, the federal courts which have considered the issue have held that the Hague Evidence Convention must be invoked timely, or waived. *Cooper Industries, Inc. v. British Aerospace, Inc.*, slip opinion, No. 83 Civ. 6366 (S.D.N.Y. Aug. 28, 1984); *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D.Vt. 1984).

In *Cooper Industries*, defendant did not seek refuge in the Hague Evidence Convention until late in the discovery stage of that litigation, and until after plaintiff had called, and the court had held, a discovery conference on the subject of the discovery information defendant refused to produce. The district court, in addition to denying defendant's Hague Evidence Convention defense on the merits, held that the end of discovery is not the proper time to urge the Convention as a defense. Accordingly it found defendant's right to raise the Convention had been waived.

Likewise, in *Murphy*, defendant participated in discovery by answering two sets of interrogatories before raising the Convention as a defense. The fact that defendant had answered interrogatories without raising the Convention was a factor influencing the court's decision not to require plaintiff to seek discovery pursuant to the Convention. *Murphy*, 101 F.R.D. at 360-61.

Similarly, Anschuetz has waived any right it may have had to raise the applicability of the Convention by

seeking discovery from other parties, by participating in and initiating depositions, by responding to requests for discovery from it, by entering into discovery agreements with various parties, by becoming a third party plaintiff and counter-claimant, and, most importantly, *by voluntarily participating in depositions taken in Germany*, all before raising the Hague Evidence Convention. Only after this litigation had been pending for *over five years* did Anschuetz raise the applicability of the Convention *for the first time.*

The delay of Anschuetz in raising its Hague Evidence Convention defense as a bar to discovery, it is submitted, renders this case an inappropriate vehicle for consideration of the issue by this Court. Gijonesa, therefore submits that the writ should be denied.

II. Even Assuming That Petitioner Did Not Waive Its Right To Raise The Hague Evidence Convention, Petitioner's Petition For A Writ Of Certiorari Should Be Denied

Petitioner, in arguing that its Petition for a Writ of Certiorari should be granted, states that the applicability of the Hague Evidence Convention to this case, and other cases, presents an important question over which the courts are sharply divided. It further argues that the Fifth Circuit's decision improperly interprets the Convention, and that there is no basis for the lower court's assumption that the evidence sought would not be provided if sought pursuant to the procedures outlined by the Convention. Petitioner argues that the Convention does not give foreign litigants an advantage in American courts by restricting the information they must produce because the Convention in no way prohibits the United States court from excluding

evidence of a Hague Evidence Convention party when the integrity of the foreign party's evidence cannot be tested. Further, Petitioner argues, the courts are free to draw adverse inferences from the foreign party's failure to produce voluntary evidence located abroad. Petitioner concludes by arguing that a proper comity analysis must be forthcoming before resorting to evidence gathering procedures outside of the Hague Evidence Convention, assuming that the Convention is not the exclusive method of obtaining evidence from abroad.

Petitioner presents no argument warranting the issuance of a Writ of Certiorari in this case, assuming for the sake of argument that Petitioner did not waive the issue below by its lengthly delay in raising it.

Initially, while the Hague Evidence Convention is an important evidence-gathering tool, there is little reason for the Court to review its applicability in light of the facts presented in this case. Twice before this Court was presented with cases wherin a party over whom the United States Court had jurisdiction was required to comply with discovery orders outside of the Convention; twice before this Court refused to consider the issue. *Club Mediterranee, S.A. v. Dorin*, 105 S.Ct.286 (1984)(appeal dismissed and cert. denied); *Voldswagenwerk A.G. v. Falzon*, 104 S.Ct. 1260 (appeal dismissed). *reh. denied*, 104 S.Ct. 1932 (1984). There is no more reason in this case than there was in *Club Mediterranee* or *Falzon* for granting a Writ of Certiorari. In fact, there is much less reason for granting a Writ of Certiorari at the present time.

First, as Petitioner properly states, heretofore, there was confusion in the jurisprudence concerning the scope of the Hague Evidence Convention and its scope of

application in gathering evidence from parties over whom the United States Court had *in personam* jurisdiction. Until the decision by the Fifth Circuit in this case, there were no federal appellate court decisions interpreting this federal convention. The lower district courts and the state courts, without any federal appellate guidance, understand-ably reached different conclusions regarding the scope of the Hague Evidence Convention. As a respected federal appellate court, the Fifth Circuit, now has discussed and decided the merits of issues fostering disagreement among the state courts and federal district courts, the void creating the conflicting decisions has been, in large part, eliminated. The appellate guidance provided by the Fifth Circuit has eliminated the source of much of the confusion which fostered the previously existing inconsistent jurisprudence, and which arguably provided the need for issuance of a writ in the past.

There is no need for this Court to grant a Writ of Certiorari in light of the careful and correct interpretation of the scope of the Hague Evidence Convention afforded by the Fifth Circuit. The district court powers questioned by Anschuetz are the powers of federal district courts over all parties, foreign and domestic, to require *parties* to produce witnesses and discovery information under their control *in the United States.* The Fifth Circuit, only after a careful and through analysis of the positions taken by all the parties, including the positions of the United States and the Federal Republic of Germany as amici curiae, and only after fully reviewing and carefully analyzing the positions taken by the state courts and lower federal courts which had previously addressed the Hague Evidence Convention, concluded that the Hague Evidence Convention "does not supplant the application of the discovery provisions of the

Federal Rules over foreign, Hague [Evidence] Convention state nationals, subject to the *in personam* jurisdiction in a United States Court." *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 604 (5th Cir. 1985).[2]

The opinion of the Fifth Circuit is soundly based and eliminates the need for further consideration by this Court. As the Fifth Circuit, and even this Court have noted, foreign based companies, and even foreign governments themselves insofar as their commercial functions are concerned, are subject to the jurisdiction of United States courts with regard to their commercial activities in the United States. *Anschuetz*, 754 F2d at 604-05 n.3, *citing, e.g., Verlinden B.V. v. Central Bank of Nigeria*, 461 US 480, 103 S.Ct. 1962, 76 L.Ed. 81(1983). Foreign entities which choose to reap the benefits of doing business in the United States should be subject to the procedural law of the United States, just as are domestic parties. The interpretation of the treaty submitted by Anschuetz and the Federal Republic of Germany, that the Convention be deemed the sole method of obtaining evidence and discovery information from a party domiciled in a Hague Evidence Convention nation, "taken to its logical conclusion, would give foreign litigants an extraordinary advantage in United States Courts." *Anschuetz*, 754 F.2d at 606. While the foreign party would be entitled the full ambit of discovery permitted by federal court procedure, the opposing party would be limited to the "cumbersome procedures and narrow range authorized by the Convention." *Id.* Whether any discovery would be obtained from German party is extremely questionable in light of the German government's

[2]The Fifth Circuit has since reaffirmed its interpretation of the Hague Evidence Convention in *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985), which is also pending before this court on a petition for Writ of Certiorari.

express declaration not to execute request for information submitted under the Convention where the purpose of the request is for pretrial discovery. *Anschuetz*, 754 F.2d at 607.[3]

Contrary to the position of Anschuetz and the Federal Republic of Germany, the overwhelming majority of courts which have required discovery against the foreign party to proceed pursuant to the Convention have concluded that the Convention is not mandatory. Rather, these courts have required compliance with the Convention as a matter of comity. *Anschuetz*, 754 F.2d at 608-09. The problem with this approach is that it will almost necessarily result in a greater affront to the foreign government than if the Convention had not been resorted to at all. The net effect is that after the foreign government rejects the request for pre-trial discovery, the United States court will order that the discovery take place anyhow, effectively second guessing the foreign tribunal from which the United States Court had initially requested assistance. *Anschuetz*, 754 F.2d at 613-14.

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[3]The Federal Republic of Germany, in its Amicus Curiae Brief, submits that the Convention is effective as evidenced by the fact that between December 31, 1979 through 1984, 151 requests under the Convention were addressed to German authorities, 131 of which were accepted and executed, and 20 of which were rejected "because the evidence to be taken was not sufficiently identified or *the request was for the production of documents under pre-trial discovery.*" Amicus brief, 10 (emphasis supplied). These statistics, at best, are misleading, and at worst, indicate the intent of the West German government to stymie pre-trial discovery from its nationals. Of the 151 requests submitted, it is unclear how many were from the United States and, more importantly, how many of the 131 requests which were granted, if any, requested *pre-trial discovery* as opposed to *trial evidence*. What is clear is that 20 requests were rejected, and that a prime reason for rejection, in accordance with West German policy as expressed in its reservation to the Convention, was because the requests were for pre-trial discovery.

Further, even comity considerations dictate against a rule requiring compliance with the Convention as to the production of discovery materials and discovery witnesses in the United States over parties whom the district court has jurisdiction, as "'[t]he United States has a clear interest in facilitating the manner in which foreign citizens doing business in the United States are available for litigation here.'" *Anschuetz*, 754 F.2d at 609 *quoting from Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360, 373 (D.Vt. 1984). The Convention, as indicated by its own language and the comments of its drafters, was not intended as a limitation of any country's internal laws concerning the gathering of evidence within its jurisdiction. *Anschuetz*, 754 F.2d at 609-610 and n. 19. Matters, such as the gathering of documents to be produced in the United States or the designation of witnesses to testify in the United States, which merely are preparatory to compliance in the United States with the discovery orders of a United States Court, do not constitute discovery in the foreign nation invoking the Hague Evidence Convention merely because the documents or witnesses are located there. The production of witnesses or documents by a party in the United States constitutes acts by a party within the jurisdiction of the United States court under the Federal Rules of Civil Procedure. *Anschuetz*, 754 F.2d at 611-12. The Hague Evidence Convention remains viable as the method to be employed in the involuntary deposition of a party conducted in the foreign nation and with the production of discovery documents or evidence in the foreign country from parties over whom the United States court has no in personam jurisdiction. Likewise, where discovery sought in the foreign country becomes particularly intrusive, the court retains the right to order that it proceed pursuant to the Convention. *Anschuetz*, 754 F.2d at 164-15.

The decision of the Fifth Circuit is well reasoned and gives proper considerations to all relevant factors, including comity considerations and the interests of the United States in promoting full and fair discovery for *all parties* engaged in litigation. In accordance with sound principles of statutory interpretation, the Fifth Circuit's decision gives effect to both the intent of the Hague Evidence Convention in expanding the scope of evidence available from foreign nations and in facilitating the flow of information among nations in judicial proceedings, while protecting the rights of all litigants in the United States Courts, *foreign* and *domestic,* to full and fair discovery. Contrary to the suggestion of Anschuetz and the Federal Republic of Germany, the opinion of the Fifth Circuit provides no basis for the issuance of a Writ of Certiorari.

CONCLUSION

Respondent, Compania Gijonesa de Navegacion S.A., submits that the petition of Anschuetz & Co., GmbH, should be denied. Initially, since Anschuetz did not properly preserve the issue by timely presenting it, and as Anschuetz participated in discovery in this litigation, including depositions from its own witnesses taken in West Germany, the issues raised in its Petition are not properly before the Court. However, should the Court find that the issues were properly preserved, there is no need for issuance of a Writ of Certiorari in light of the through analysis of the Fifth Circuit, which alleviated much of the confusion resulting in conflicting decisions before the issuance of its opinion.

Alternatively, should the Court find that the issuance of a Writ of Certiorari is appropriate, Respondent suggests that the Court issue a *per curiam* decision affirming without an opinion the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served all opposing counsel with a copy of the foregoing Opposition To Petition For A Writ Of Certiorari To The United States Court of Appeals For the Fifth Circuit by depositing a copy thereof, properly addressed and first class postage prepaid, in the United States Mail, this 14th day of August, 1985.

_____